

# Exhibit 5

1 UNITED STATES BANKRUPTCY COURT  
2 EASTERN DISTRICT OF NEW YORK  
3 Case No. 8-16-74892-ast  
4 - - - - - x  
5 In the Matter of:  
6  
7 OLYMPIA OFFICE LLC,  
8 Debtor.  
9 - - - - - x  
10 Case No. 8-16-75515-ast  
11 - - - - - x  
12 In the Matter of:  
13  
14 WA PORTFOLIO LLC,  
15 Debtor.  
16 - - - - - x  
17 Case No. 8-16-75516-ast  
18 - - - - - x  
19 In the Matter of:  
20  
21 MARINERS PORTFOLIO LLC,  
22 Debtor.  
23 - - - - - x  
24  
25

1 Case No. 8-16-75517-ast

2 - - - - - x

3 In the Matter of:

4

5 SEAHAWK PORTFOLIO LLC,

6 Debtor.

7 - - - - - x

8 Adv. Case No. 8-16-08167-ast

9 - - - - - x

10 OLYMPIA OFFICE LLC,

11 Plaintiff,

12 v.

13 MLMT 2005-MCP1 WASHINGTON OFFICE PROPERTIES, LLC,

14 Defendants.

15 - - - - - x

16 United States Bankruptcy Court

17 290 Federal Plaza

18 Central Islip, New York 11722

19 September 28, 2017

20 2:14 PM

21 B E F O R E:

22 HON. ALAN S. TRUST

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: JAF / YM

1 HEARING re Adj Status Conference [23] Adj from 01/11/17

2

3 HEARING re Order Assigning Matter to Mediation; that the  
4 Honorable Arthur B. Federman is hereby designated as mediator;  
5 the Mediation Parties shall file a joint status letter as to  
6 whether the Mediation resulted in a settlement by August 14,  
7 2017. [314]

8

9 HEARING re Adj Motion to Substantively Consolidate Lead Case  
10 16-64892 with 16-75515, 16-75516, 16-75517 Filed by Jordan  
11 Pilevsky on behalf of Olympia Office LLC. [38]

12

13 HEARING re Hearing on Disclosure Statement Filed by Alan M Feld  
14 on behalf of MLMT 2005-MCP1 Washington Office Properties, LLC  
15 (RE: related document(s)266 Disclosure Statement filed by  
16 Creditor MLMT 2005-MCP1 Washington Office Properties, LLC)  
17 [332]

18

19 HEARING re Hearing on Disclosure Statement filed by Jordan  
20 Pilevsky on behalf of Mariners Portfolio LLC, Olympia Office  
21 LLC, Seahawk Portfolio LLC, WA Portfolio LLC (RE: related  
22 document(s)132 Disclosure Statement filed by Debtor Olympia  
23 Office LLC, Jointly Administered Debtor WA Portfolio LLC,  
24 Jointly Administered Debtor Mariners Portfolio LLC, Jointly  
25 Administered Debtor Seahawk Portfolio LLC) [132]

1 HEARING re Hearing on Disclosure Statement Filed by Jordan  
2 Pilevsky on behalf of Mariners Portfolio LLC, Olympia Office  
3 LLC, Seahawk Portfolio LLC, WA Portfolio LLC (RE: related  
4 document(s) [243] Amended Disclosure Statement filed by Debtor  
5 Olympia Office LLC, Jointly Administered Debtor WA Portfolio  
6 LLC, Jointly Administered Debtor Mariners Portfolio LLC,  
7 Jointly Administered Debtor Seahawk Portfolio LLC) (Entered:  
8 06/06/2017) [255]  
9  
10 HEARING re Hearing on Disclosure Statement for Noteholders  
11 Chapter 11 Plan of Liquidation Filed by Alan M Feld on behalf  
12 of MLMT 2005-MCP1 Washington Office Properties, LLC. [266]  
13  
14 HEARING re Telephonic Conference - Motion for Adequate  
15 Protection Motion or Order Requiring Adequate Protection Filed  
16 by Alan M Feld on behalf of MLMT 2005-MCP1 Washington Office  
17 Properties, LLC. [279]  
18  
19 HEARING re Ruling Conference - Hearing on (RE: related  
20 document(s) 95 Motion to Dismiss Case filed by Creditor MLMT  
21 2005-MCP1 Washington Office Properties, LLC) [95]  
22  
23 HEARING re Ruling Conference - Motion to  
24 Object/Reclassify/Reduce/Expunge Claims: Claim Number(s): 4-1.  
25 Filed by Jordan Pilevsky on behalf of Olympia Office LLC. [127]

1 HEARING re Ruling Conference - Motion for Relief from Stay MLMT  
2 2005-MCP1 Washington Office Properties, LLCs Motion for Relief  
3 From the Automatic Stay Under Bankruptcy Code Sections  
4 362(d)(1), 362(d)(2), and 362(d)(4). Filed by Alan M Feld on  
5 behalf of MLMT 2005-MCP1 Washington Office Properties, LLC.

6 [94]

7  
8 HEARING re 8-16-75515-ast Adj Status Conference [6]  
9 Adj from 01/11/17

10  
11 HEARING re 8-16-75515-ast Adj Motion to Substantively  
12 Consolidate Lead Case 16-74892 with 16-75515, 16-75516, 16-  
13 75517 Filed by Jordan Pilevsky on behalf of WA Portfolio LLC.  
14 [14] Adj from 01/11/17

15  
16 HEARING re 8-16-75516-ast Adj Status Conference [6]  
17 Adj from 01/11/17

18  
19 HEARING re 8-16-75516-ast Adj Motion to Substantively  
20 Consolidate Lead Case 16-74892 with 16-75515, 16-75516, 16-  
21 75517 Filed by Jordan Pilevsky on behalf of Mariners Portfolio  
22 LLC. [14] Adj from 01/11/17

23  
24 HEARING re 8-16-75517-ast Adj Status Conference [6]  
25 Adj from 01/11/17

1 HEARING re 8-16-75517-ast Adj Motion to Substantively  
 2 Consolidate Lead Case 16-74892 with 16-75515, 16-75516, 16-  
 3 75517 Filed by Jordan Pilevsky on behalf of Seahawk Portfolio  
 4 LLC. [14] Adj from 01/11/17  
 5  
 6 HEARING re 8-16-08167-ast Order Assigning Matter to Mediation;  
 7 that the Honorable Arthur B. Federman is hereby designated as  
 8 mediator; the Mediation Parties shall file a joint status  
 9 letter as to whether the Mediation resulted in a settlement by  
 10 August 14, 2017. [57]  
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 25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

2

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9 Attorney for the U.S. Trustee

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22 BY: ALAN M. FELD

23 THOMAS MONAHAN

24  
25 EDWARD VELTON, Receiver

P R O C E E D I N G S

CLERK: Case #16-74892, Olympia Office LLC.

THE COURT: Take appearances, please. First in the Courtroom.

MR. MANISCALCO: Good morning, good afternoon, Your Honor. Joseph Maniscalco, LaMonica Herbst & Maniscalco on behalf of the Debtors.

MR. PILEVSKY: Good afternoon, Your Honor. Jordan Pilevsky, LaMonica Herbst & Maniscalco on behalf of the Chapter 11 Debtors.

MR. FELD: Good afternoon, Your Honor. Alan Feld and Thomas Monahan of Sheppard, Mullin, Richter & Hampton on behalf of the Noteholders.

MR. DIMINO: Good afternoon, Judge. Alfred Dimino from the Office of the United States Trustee.

CLERK: The parties on the phone, Judge.

THE COURT: You mean on the telephone? On the telephone.

MR. WATHEN: Good afternoon, Your Honor. Rick Wathen on behalf of Centrum Financial.

MR. FILUSCH: Good afternoon, Your Honor. Edward Filusch on behalf of Oracle.

MR. SHIGLEY: Charles Shigley on behalf of the Receiver, JSH Properties.

MR. COHEN: Good afternoon, Your Honor. Ted Cohen on

1       behalf of Sheppard Mullin also on behalf of the Noteholder.

2               MR. VELTON:   Good afternoon, Your Honor.   Ernie  
3       Velton, Receiver.

4               THE COURT:   All right.   Anyone else?   All right.   Let  
5       me ask if the parties have been able to reach a settlement on  
6       the issues up for ruling conference today.   Mr. Maniscalco, Mr.  
7       Feld?

8               MR. MANISCALCO:   We have -- we've had a lot of robust  
9       discussions, we're trying to resolve the asset protection  
10      motion.   We're very close on getting that done.   We do not have  
11      a resolution as we stand here today in writing done with  
12      respect to the trial that we had during the summer.

13              THE COURT:   All right.   Mr. Feld, you concur?

14              MR. FELD:   I would agree with that, Your Honor.   I  
15      mean, we've made a lot of efforts, including in the mediation,  
16      and there's still some ongoing discussions, but there's been no  
17      meeting of the minds yet.

18              THE COURT:   All right.   All right, then the Court  
19      prepared and to announce its ruling in the narrative form on  
20      various matters.   I'll delineate what those matters are and  
21      what those rulings are.   This will be the Court's findings of  
22      fact and conclusions of law stated in narrative form in  
23      accordance with Bankruptcy Rule 7052 with respect to the  
24      following matters.

25              The motion for relief from stay filed by MLMT 2005-

1 MCPI Washington Office Properties, LLC, which I'll be referring  
2 to as Noteholder, is at docket 94. Noteholder's motion for  
3 dismissal or conversion -- motion for dismissal or conversion  
4 of the bankruptcy cases under Section 1112(b); it's docket item  
5 95. Response and opposition from the Debtor to each of those  
6 motions at docket items 107 and 110. The Debtor's objection to  
7 the noteholder's proof of claim at docket item 127, and the  
8 response of the noteholders in opposition to the Debtor's claim  
9 objection at docket item 152.

10 For the reasons to follow, the Court has determined  
11 that the bankruptcy cases will be dismissed under Section 1112  
12 for cause, but not as a bad faith filing. In terms of  
13 prepetition history, much of that has been set out by this  
14 Court in its Order concerning the Debtor's standing to object  
15 to the ML -- the noteholder's claim, which Order appears at  
16 docket item 283, as well as the Court's Order denying the  
17 noteholder's motion to reconsider that ruling, which appears at  
18 docket item 350.

19 I will not restate the entire factual background of  
20 this dispute; but, instead, refer the parties to the facts as  
21 contained in the standing Order, but I will give brief context  
22 and background for purposes of these rulings today.

23 In 2004, an entity known as CDC Properties I entered  
24 into a series of loan agreements with Merrill Lynch. Those  
25 will be referred to as the loans and the original lender.

1           On November 28th, the remaining acquiring entities  
2       filed for Chapter 11 relief before this Court, and those cases  
3       were then administratively consolidated. I'll collectively  
4       refer to the acquiring entities as the debtors. On December  
5       1st of 2016, the Court entered the Order upon which -- under  
6       which it determined that the automatic stay was in effect  
7       because the properties were the property of the debtor's  
8       bankruptcy estate.

9           Subsequently, the noteholder and the, respectively,  
10      the debtors filed the various motions, which I listed at the  
11      beginning of this ruling, which are the subject of the herein  
12      conference today. After extensive discovery was undertaken  
13      between the parties and various discovery disputes were  
14      resolved by the Court, on May 24th of this year, the Court  
15      conducted an evidentiary hearing on those various motions. The  
16      Court made a number of evidentiary rulings at the time of trial  
17      and issued some subsequent to trial in connection with the  
18      standing Order.

19           I will today as I have noted in prior settings that  
20      this case -- these cases have been marred by constant  
21      disagreements, if not bickering, between the debtors and the  
22      noteholders. For a \$40 million or so dispute, the docket  
23      reflects extensive litigation history of these cases. The  
24      Court noted at the time of trial that in the aggregate, the  
25      trial of the case -- at the trial of the case, the Court was

1 presented with some 6,000 pages of trial exhibits, which  
2 included testimonial affidavits, appraisal reports, and  
3 deposition excerpts. As the record will reflect, the Court  
4 also took live testimony from a number of witnesses. The Court  
5 scheduled and held closing arguments on the parties' motions on  
6 July 12th.

7 I'll first turn to why this Court has determined that  
8 cause existed to dismiss these cases. It is centered upon the  
9 inability of the debtors to obtain confirmation of the plan of  
10 reorganization. On May 31st, the debtor's filed their second  
11 amended plan and second amended disclosure statement for the  
12 plan at docket item 243. The plan provides for three classes  
13 of creditors -- well, two classes of creditors and one class of  
14 interested owners.

15 The first is Class 1, the noteholder, which the  
16 debtor estimated to hold the secured claim at just over \$33  
17 million. The debtor proposed to market and sell the properties  
18 over a period of 12 months after confirmation, either as a  
19 portfolio group or as individual properties. The debtor would  
20 pay the noteholder from the proceeds of those sales and obtain  
21 partial lien releases to the extent that properties were sold  
22 individually and would pay the noteholder interest at 4 percent  
23 pending final payoff.

24 As to Class 2, the debtor purportedly -- purported to  
25 create a class of general unsecured creditors owed, by debtor's

1 the noteholder has its rights that it can enforce outside of  
2 these cases.

3 The Court notes that at several junctures during  
4 these cases, proposed to the parties and even suggested that  
5 the estate's properties could be liquidated, converted to cash,  
6 and the parties left to fight over who gets the cash proceeds.  
7 But the noteholder has consistently been opposed to that  
8 approach based on statements made on the record.

9 Finally, to the extent that the properties may be  
10 worth less than the legitimate debts owed to the noteholders,  
11 there'd be no equity available for other parties. That's  
12 particularly true once the cost of liquidating those properties  
13 is considered, including if the cases were converted rather  
14 than dismissed, potential Chapter 7 Trustee and other Chapter 7  
15 administrative expenses. In other words, the Court considered  
16 in order to convert the cases to Chapter 7, that would simply  
17 add another layer of administrative expenses beyond those  
18 already incurred in the Chapter 11 estates. And under no  
19 reasonable circumstances would they create a dividend for  
20 unsecured creditors if, in fact, there are any.

21 With respect to the issue of equity, equity in the  
22 properties. Because these issues have been raised and  
23 extensively litigated, the Court will address -- briefly  
24 address -- the values of the properties and the debts owed to  
25 the noteholders.

1 First, with respect to the debt. The debtors have  
2 demonstrated to the Court through various exhibits and trial  
3 testimony I'll refer to and has raised issues concerning  
4 whether or not the noteholder or prior to it, really Midland,  
5 when they were actually -- when the debt -- when the notes were  
6 actually accelerated and whether or not they were properly  
7 accelerated. That issue relates to calculation of the  
8 noteholder claim because it substantially impacts the amount of  
9 default interest it was owed by CDC and by a position of the  
10 properties of the debtors at the petition date.

11 The CDC plan provided certain waterfall provisions  
12 governing how payments were to be made to creditors from the  
13 income generated from the operation of the properties, and how  
14 those payments would be distributed to creditors, and how funds  
15 would need to be used to fund certain reserves and certain  
16 (indiscernible).

17 That cash management agreement, which is referred to  
18 in the CDC plan, which is Noteholder Exhibit 9 at Page 9,  
19 actually refers to the deed of trust, which is a record and is  
20 part of the proceedings before this Court. The Court had asked  
21 whether the cash management agreement was part of the trial  
22 record and closing arguments. Noteholders indicated no. But  
23 then the Court reviewed that the cash management agreement  
24 appears to actually be the substantial provisions buried in the  
25 CDC deed of trust started at Page 58, and that's at Exhibit A.



1           Following confirmation of the CDC plan, essentially  
2           Midland as noteholder's predecessor, was in control of all CDC  
3           revenues through a central account and had the authority to  
4           direct funds to the ultimate payees, pursuant to the waterfall  
5           provisions of the plan. Even though the CDC plan directs the  
6           debtor to make payments, it could not because those funds were,  
7           actually under the control of Midland.

8           The contract that was of interest as stated on Note A  
9           was 5.45 percent, and the default rate was 9.45 percent. The  
10          contract noted interest on the B note was 12.75 percent, but  
11          the default rate was 16.75 percent. Given the substantial  
12          millions of dollars that were owed throughout the life of the  
13          CDC plan, the increase in the rate to accrue on the loans are 4  
14          percent of the Note A or Note B obviously is a substantial  
15          difference. The debtor's position that the noteholders claims  
16          in these cases are inflated by several million dollars, because  
17          the noteholders calculated default interest on both notes from  
18          a time far too early. With respect to the trial record, we'll  
19          return to that in a moment.

20          The debtors attempted to introduce an accountant's  
21          report that would attempt to tract those issues concerning when  
22          the notes should have gone over default and had been  
23          accelerated. The noteholders objected to that report being  
24          admitted, so the Court did not admit the report. The  
25          noteholders then attempted to settle post-trial to supplement

1 the record to rebuff the debtor's arguments concerning the  
2 calculation of default interest, and the Court did not allow  
3 that supplementation either. Those decisions have been  
4 published.

5 With the absence of any forensic accounting analysis,  
6 the Court was then left to analyze the dispute over default  
7 interest based upon bank statements, recreated (indiscernible),  
8 and various correspondence between Midland and CDC, including a  
9 variety of default notices.

10 The loan history and the record before this Court  
11 gave no clear answer as to the profit made from which the Note  
12 A and/or Note B should have been accelerated or, in fact, the  
13 dates from which they were actually accelerated, while the  
14 third parties as follows: Exhibits 111 and 112 constitute the  
15 loan histories of the A note and the B note, and they do not  
16 demonstrate that the notes had been treated as being in default  
17 as early as the noteholder now asserts as of the petition date  
18 or the exhibit prior to the petition date in Exhibit 79, the  
19 Olympia petition date.

20 Exhibit 79 constitutes a default notice that Midland  
21 sent to CDC on June 4th of 2014 stating that the B note was in  
22 default for failing to make the required plan payment, the  
23 required monthly payment, which was approximately \$27,000.  
24 Those payments were to have begun on January 1st of 2013. The  
25 June 4, 2014 default notice appears to assert that the B note,

1 while making default in January of 2013, although that default  
2 letter is far from the height of clarity. That to enforce the  
3 2014 default letter also appears to state that Midland is  
4 entitled to exercise any of the remedies provided in the loan  
5 documents; but later on, states that CDC has 10 days to cure  
6 these defaults or Midland was entitled to, quote, "pursue  
7 remedies under the loan documents, which could include charging  
8 default interest."

9 The Court was also provided with something of an  
10 account reconciliation at Exhibit HH, showing apparently that  
11 the B note was not paid by Midland starting with the April 2013  
12 payment through September of 2014, but the payments resumed in  
13 October of 2014. The noteholder has consistently asserted that  
14 the B note went into default in July of 2013 causing a cross-  
15 default under the A note. But based on Exhibit HH, it is  
16 unclear how the noteholder came to that conclusion. The  
17 noteholder did concede that the trial record is absent of any  
18 writing sent from Midland or any other party in connection with  
19 the CDC loan that CDC was notified in or around July of 2013  
20 that Note A or Note B had gone into default.

21 The noteholder referred the Court to the paid  
22 histories in Exhibits 111 and 112 with respect to defaults  
23 under Note A and Note B. But with respect to the A note,  
24 Exhibit 111 appears to show that the A note continued to  
25 receive payments through May of 2016; but more importantly,

1 that the principal balance of the A note was continuing to  
2 decrease each month as payments were being made. There's no  
3 indication that the accrual of default interest in Exhibit 111  
4 from a date nearly as early as July of 2013 or even to May of  
5 2014.

6 Similarly, the B notes paid history of Exhibit 112  
7 indicates that CDC plan payments were being made through the  
8 May 2014 principal with interest through the May 2014 payment.  
9 And, again, principal is decreasing after each payment was  
10 made, indicating that default interest on the B note was not  
11 charged prior to May of 2014.

12 Both of those pay exhibits, 111 and 112, do appear to  
13 include advances that Mr. (indiscernible) would testify to at  
14 his deposition at docket 296, that Midland was making certain  
15 advances on account of the CDC and its obligations under the  
16 plan started sometime in 2013. Those advances appear to  
17 aggregate \$1.08 million and appear to be reflected in Exhibits  
18 156 and 152.

19 The paid histories, going back to Exhibits 111 and  
20 112, appear to state that the current interest rate on the A  
21 note of 5.45 percent, which is specified on the paid history,  
22 was the rate being charged as of July 1, 2016, appearing to at  
23 least indicate, as the debtor argued, that the A note was not  
24 actually being charged default interest prior to July of 2016.  
25 Similarly, the B note history shows the current interest rate

1       stated at 12.75 percent as being carried on the B note at least  
2       as of the last payment date of May 1, 2014.

3               As if that series of information of the trial record  
4       weren't adequately confusing, Midland sent a default notice on  
5       September 4th of 2015 stating that the A note and the B note  
6       both went into monetary default on September 1st of 2015.  
7       That's Exhibit 80. The debtors have consistently argued on  
8       this point that, as I stated, their assertion that the claims  
9       in these cases are overstated by the noteholders, number one;  
10      and number two, that Midland had the ability through the  
11      management of the debtor's cash to have precluded either note  
12      from having gone into monetary default based upon Midland's  
13      decision whether to fund reserves and sub-account reserves or  
14      make plan note payments.

15             The debtors have argued that there was always  
16      adequate cash to make the note payments, but that Midland  
17      instead chose at some time to cause a plan payment default by  
18      funding sub-reserve accounts rather than making plan payments.  
19      The debtors refer to a series of bank statements that were  
20      provided in the record. And, again, no forensic account of the  
21      analysis was provided to the Court for the reasons I've already  
22      outlined.

23             The Court -- this Court was not able to reconcile all  
24      of these raw bits of data to make a final determination of how  
25      much the noteholder was actually owed as of the petition date.

1 That, as I'm sure you all know, is typically provided through  
2 accounting forensic analysis with both sides bringing experts  
3 who will go through the bank statements, go through the paid  
4 histories, express their opinions based upon the raw data, and  
5 the Court will then reconcile those opinions and the raw data.  
6 But as I've stated for the last several minutes, the Court has  
7 attempted to do so by analyzing what was included in the trial  
8 record.

9 But for this Court to make a specific determination  
10 of the date or dates upon which the A note and B note went into  
11 default and then calculate the precise amount owing to the  
12 noteholder as the petition date, is one not an available  
13 exercise based upon the record created; but, more importantly,  
14 not necessary for the ultimate conclusions that I've reached  
15 that these cases will be dismissed.

16 There is no doubt though, based upon the trial record  
17 including the prepetition foreclosure notice, which is at  
18 Exhibit 3, that at least \$33 million was owed to the noteholder  
19 at the petition dates; and that if the properties were worth  
20 more than \$33 million at the petition dates, the noteholder was  
21 over secured, but the debts continued to accrue interest at the  
22 default rate post-petition, plus attorney's fees and other  
23 reasonable charges.

24 The debtors have never contended that the notes were  
25 not in default as of the petition date or entitled to post-

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I N D E X

RULINGS

	Page	Line
Bankruptcy Cases Dismissed	11	11

C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing  
transcript is a true and accurate record of the proceedings.

Sonya  
Ledanski Hyde

Digitally signed by Sonya Ledanski  
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